In the Supreme Court of the United States

APRIL TERM, 1976

No. 75-1406

JOAN ELIOPULOS
Petitioner

V.

V. H. HILDYARD, M. D., AND
MEDICAL ADMINISTRATIONS INC., *Assignee*

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF COLORADO

JOAN ELIOPULOS
PETITIONER, PRO SE
1161 SOUTH FOOTHILL DRIVE
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V. H. HILDYARD, M. D., AND MEDICAL ADMINISTRATIONS INC., *Assignee*

Petitioner, Joan Eliopulos, prays for a writ of certiorari to review the opinion and judgment of the Court of Appeals of the State of Colorado in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B, P. 2a) is reported (D. Colo. 1975).

The opinion and decision of the District Court C27482 Division 1 is on record in the Colorado Court of Appeals.

JURISDICTION

The Court of Appeals of the State of Colorado entered judgment on November 6th, 1975.

A timely petition for rehearing was denied on November 28th, 1975.

Petition for a writ of certiorari to the Colorado Court of Appeals was denied by the Supreme Court of the State of Colorado on February 17, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether Doctor Hildyard's impairment interfered with his ability to perform delicate microsurgery of the ears.

2. Whether V. H. Hildyard, M.D. was negligent in failing to advise the petitioner that he was suffering from a physical disability to the extent that he could not properly and effectively operate upon this petitioner.

3. Whether V. H. Hildyard, M.D. was negligent in failing to advise the petitioner that he was suffering from a physical disability to the extent that he could not properly and effectively operate for a prolonged period of time.

4. Whether it is a patient's inherent right to be informed of the attending physician's disability before any surgery is attempted upon patient's body.

STATEMENT OF THE CASE

This claim arises out of that certain action brought in the County Court and in and for the City and County of Denver and the State of Colorado in the Civil Division entitled Medical Administrations Inc., (plaintiff), -vs- Joan Eliopulos (defendant), and which related to the filing of a counterclaim.

Since the commencement of the suit in the County Court for damages to petitioner's left ear as a result of surgery performed by V. H. Hildyard, M.D., petitioner only on October 7th, 1972, when a newspaper article appeared in The Rocky Mountain News, did become aware that V. H. Hildyard, M.D. had been injured in an automobile traffic accident on May 21st, 1969, and prior to the surgery upon this petitioner, for which V. H. Hildyard, M.D. was found to deserve a jury award and compensation in the amount of $315,000.00 on October 6th, 1972, in the District Court in and for the City and County of Denver, State of Colorado, Civil Action Case No. C-11660, Division 5 – which injury by V. H. Hildyard's own admission caused permanent disabling injuries to his left arm, hand, and fingers and a loss of skill to properly and effectively perform delicate microsurgery of the ears.[1]

On June 3rd, 1970, in the City and County of Denver, State of Colorado, V. H. Hildyard, M.D., a physician and surgeon specializing in otology, relating to microsurgery of the ears, knowingly, willfully, and with a wanton and reckless disregard for petitioner's rights and feelings, performed a surgical stapedectomy procedure on petitioner's left ear at which time and place V. H. Hildyard, M.D. well knew he had lost the use of his left arm, hand and fingers and the necessary skill to properly and effectively perform as an ear surgeon as a result of injuries he received in an automobile traffic accident on May 21st, 1969.

Petitioner entered surgery on June 3rd, 1970 with all the confidence in the world because she felt she had a surgeon who had the full use of both his hands – who had the skill and dexterity of fingers vital to his capability to properly and effectively perform the necessary procedure required.

Within weeks this petitioner began to feel the results of the June 3rd, 1970 surgery. Her hearing, the beautiful hearing she had before surgery was gone. Petitioner's ear felt like a wad of cotton was muffling all sound. She could not chew

[1] See Appendix A.

without feeling movement of some loose object in her left ear. Petitioner could not bend or stoop without getting dizzy – and the nights were the worst. Petitioner could not sleep for the loud noises she heard in her left ear. When she did sleep, petitioner would be awakened to find there was numbness on the left side of her face. When the numbness wore off there was severe sharp pain that lasted just for seconds, but it was there! This petitioner suffers today as a result of the June 3rd surgery.

At the request of V. H. Hildyard's council, April 14th, 1972, petitioner underwent a complete ear examination by their otologist, Marlin Weaver, M.D. The Doctor's report contained the following:

> Joan Eliopulos is suffering from an ineffective sound conductive mechanism in the middle left ear.

The ineffective sound conductive mechanism is the wire prothesis which V. D. Hildyard, M.D. placed in petitioner's left ear – with an impaired left hand – during surgery on June 3rd, 1970.

Through a Prudential insurance claim, V. H. Hildyard, M.D. did in fact perform one type of surgery but claimed to have done another. The insurance form concerns Dr. Hildyard's claim for six hundred dollars medical services rendered to petitioner for surgery on June 3rd, 1970. V. H. Hildyard, M.D. refers to "shattered footplate removed." He later denied he performed this type of surgery.

V. H. Hildyard's surgical nurse and assistant, Muriel Hanewinckel, under oath, so testified, "Yes sir, I can tell you some things that have happened since his accident that have never happened since I have been working for Dr. Hildyard. He was doing all these crazy things in the operating room that he had never done before and this indicated to me something was haywire somewhere."

In February of 1975, the Honorable Justice Charles Goldburg dismissed petitioner's Civil Action Suit No.

C-27482 with a directed verdict in favor of V. H. Hildyard, M.D.

V. H. Hildyard, M.D. was given permission through the Colorado District Court and by the Trial Judge to continue his one armed surgery – microsurgery so delicate that in Dr. Hildyard's own words, one slip of the fingers and school's out.

Petitioner then appealed to the Colorado Court of Appeals. It was concluded that the verdict was properly directed as to the four negligence claims but should not have been directed on the claim for breach of warranty. It was reversed as to that claim only and remanded for a new trial on that claim only.

Petitioner's petition for a writ of certiorari from the Supreme Court of the State of Colorado was denied by the Supreme Court of Colorado on February 17, 1976.

Therefore, this petitioner prays for a writ of certiorari from the Supreme Court of the United States, Washington, D.C.

REASONS TO GRANT CERTIORARI

This Honorable Court has just granted certiorari to consider questions one, two, three and four in the interest of better serving justice. All evidence to prove negligence stems from one indisputable fact. V. H. Hildyard, M.D. well knew he had lost the use of his left arm, hand and fingers and the necessary skill to perform any of his microsurgery requiring the use of the operating microscope.

Petitioner contends when the Medical Society of the State of Colorado fails to censure and initiate any precautionary methods to prevent unethical, incompetent and negligent surgeons in the medical profession from consciously performing surgical procedures that are motivated by their greed for money and not within the gamut of accepted medical standards, such as the case at bar, litigation begins and the

courts of law must step IN to protect the rights and feelings of over two hundred million users of medical services in these United States.

Damages are allowed – not only as compensation to the injured – but rather as a deterrent to other imcompetent disabled surgeons who may wish to follow in Dr. Hildyard's footsteps.

Therefore, if there be no ruling on impaired negligent surgeons who attempt surgery on unwary patients without their knowledge or informed consent, then, let there be a ruling set forth by this Honorable Court beginning with this petitioner's case.

CONCLUSION

Petitioner prays this high tribunal and Honorable Justices therein exercise the original jurisdiction of their sound and judicial power – the power of judging wisely, and justly grant this petition for a writ of certiorari. Find for this petitioner, grant her the relief she sought at the beginning of this action and for such other relief as to the Honorable Court seems just and proper.

Respectfully submitted:

JOAN ELIOPULOS,
Petitioner, pro se
1161 South Foothill Drive,
Lakewood, Colorado 80228.

APRIL, 1976

APPENDIX

APPENDIX A

Doctor awarded $315,000 in suit

A Denver District Court jury awarded a $315,000 judgment Friday to a surgeon whose ability to perform delicate ear operations was impaired by an auto collision three years ago.

The jury deliberated six hours before returning the judgment in favor of Dr. Victor H. Hilliard, 55, of 955 Eudora St. Named as defendants in the civil suit were Harvey Bostrom, 25, of 4671 Grant St., and his employer at the time of the crash, Western Fasteners Inc.

Hilliard said his left hand and left upper shoulder were injured when a pickup driven by Bostrom plowed into the rear end of his car on May 5, 1969, at S. Colorado Boulevard and E. Florida Avenue.

Since the crash, Hilliard said, he has been able to continue as a surgeon but has been prevented from performing two types of very delicate ear operations because of tingling and frequent numbness in his left hand.

Hillard has asked a $395,258 judgment for loss of enjoyment of life, loss of his capacity to perform as an ear surgeon and loss of future earnings.

APPENDIX B

COLORADO COURT OF APPEALS

No. 75-173

JOAN ELIOPULOS,Plaintiff-Appellant,

v.

VICTOR H. HILDYARD, M.D., Defendant-Appellee

and

MEDICAL ADMINISTRATIONS, INC., Assignee,

Defendant.

Appeal from the District Court of the
City and County of Denver

Honorable Charles Goldberg, Judge

DIVISION I

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART, AND
REMANDED WITH DIRECTIONS

Coyte, Van Cise, and Sternberg, JJ.

Joan Eliopulos
Pro Se
Zarlengo, Mott and Zarlengo
John C. Mott
Denver, Colorado
Attorneys for Defendant-Appellee

Opinion by JUDGE VAN CISE

Plaintiff, Joan Elipuolus (the patient), sought to recover damages for alleged injuries purportedly resulting from an ear operation performed by defendant, Victor H. Hildyard, M.D. (the Doctor). Contending that substantial evidence was presented in support of her claims for negligence and breach of warranty, the patient appeals the judgment entered on the verdict directed for the doctor on all claims at the conclusion of her case. Upon review of the evidence in the light most favorable to the patient, *see Jasko v. F. W. Woolworth Co.*, 177 Colo. 418, 494 P.2d 839, we conclude that the verdict was properly directed as to the four negligence claims but should not have been directed on the claim for breach of warranty. We therefore reverse as to that claim only.

I

During argument on the motion for directed verdict, counsel for the patient conceded that a *prima facie* case had not been established on the claims based on (1) improper diagnosis, and (2) negligent performance of surgery. We agree.

As to the claim that doctor's own physical impairment resulted in negligent performance of surgery due to lack of skill, the patient produced no evidence showing either negligence in the performance of the surgery or any impairment in the doctor's ability to perform, or in his performance of, this particular surgery. Further, there was no evidence to establish any casual connection between the surgery and the patient's condition thereafter. In fact, there was evidence indicating that her hearing actually improved following the operation. Her later regression was not shown to be in any way related to what the doctor had done.

The final negligence claim was premised on the allegations that the doctor was negligent in failing to advise the patient of the serious nature and circumstances, the risks, and the possible complications inherent in the proposed surgery, and in failing to advise her of his own physical impairment, and that, as a proximate result of this negligence, the patient was damaged. There being no proof that her post-operative

condition was caused by the surgery, that claim also was properly rejected. *Lamme v. Ortega,* 129 Colo. 149, 267 P.2d 1115; *Brown v. Hughes,* 94 Colo. 295, 30 P.2d 259.

The patient having failed to prove the elements of negligence, a directed verdict was proper as to those claims. That there may have been a bad result is not of itself proof of negligence on the part of the doctor. *Brown v. Hughes, supra.*

II.

"In the absence of a special contract otherwise providing . . . a physician . . . does not undertake to warrant a cure and is not responsible for want of success, unless that want results from failure to exercise ordinary care, or from his want of ordinary skill." *Brown v. Hughes, supra; Locke v. Van Wyke,* 91 Colo. 14, 11 P.2d 563. However if the facts disclose that a warranty was made, was breached, and that damages resulted therefrom, then the patient does not have an actionable claim thereon against the doctor. *See Bailey v. Harmon,* 74 Colo. 390, 222 P. 393; *Noel v. Proud,* 189 Kan. 6, 367 P.2d 61; *Seanor v. Browne,* 154 Okla. 222, 7 P.2d 627. Such a claim is based on contract, not negligence, and damages, if any, are "restricted to the payments made and to the expenditures for nurses and medicines or other damages that flow from the breach thereof." *Noel v. Proud, supra.*

In the instant case, the patient alleged that the doctor expressly warranted that the operation would be successful, and that it would substantially reduce the partial hearing loss in her left ear. She further alleged that, in reliance on this warranty, she agreed to the operation and, as a result thereof, she now suffers from a much more severe hearing loss and has incurred other complications, which together constitute a breach of the warranty. The doctor denied these allegations.

In support of her claim, the patient and her mother, who accompanied her to the doctor's office on at least one occasion, testified as to statements made by the doctor prior to the operation. The trial court correctly ruled that certain statements claimed to have been made by the doctor, that the

patient would be "reborn with a brand new ear," or "had not a thing to worry about," did not rise to the dignity of an express warranty. *See Marvin v. Talbott,* 216 Cal. App. 2d 283, 30 Cal. Rptr. 893, in which the court held that the assertion, "I will make a new man out of you," was "so vaguely expressed as to be wholly unascertainable" and therefore did not constitute a warranty.

There is other testimony in the record, however, which is more specific. The patient related that Dr. Hildyard had told her that after the operation her hearing would be "better than normal." Her mother testified that the doctor had assured the patient "she would hear better than before, words that she never had heard." These phrases have ascertainable meanings.

The doctor denied making any of these statements. Therefore, an issue of fact existed for determination by the jury. "[W]here there is substantial evidence tending to establish a cause of action, it is error to direct a verdict in favor of defendant; . . . it is not for the court to judge as to the weight of the evidence nor the credibility of witnesses." *Nelson v. Centennial Casualty Co.,* 130 Colo. 66, 273 P.2d 121.

The judgment is reversed on the breach of warranty claim, and the cause is remanded for a new trial on that claim only.

JUDGE COYTE and JUDGE STERNBERG concur.

IN THE SUPREME COURT OF THE
STATE OF COLORADO

75-173 No. C-855 January Term, 1976

JOAN ELIOPULOS,

Petitioner,

vs.

V. H. HILDYARD, M.D., and
MEDICAL ADMINISTRATIONS, INC.,
ASSIGNEE,

Respondents

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

February 17, 1976

By the Supreme Court
Sitting En Banc

APPENDIX C

LODGED WITH THIS PETITION FOR A WRIT OF CERTIORARI ARE THE FOLLOWING:

MISCELLANEOUS EVIDENCE:

1. Deposition of Dr. Hildyard C-11660, 3/11/70, three months prior to surgery upon this petitioner June 3rd, 1970.

2. Civil Action C-11660 excerpt of testimony V. H. Hildyard VS. Western Fasteners Inc., A Colorado Corp., and Harvey Bostrom. This excerpt of testimony is evidence by V. H. Hildyard's own admission of his impairment and disability. Evidence of how it affected his surgical procedures.

3. Civil Action C-11660 excerpt of testimony Muriel Hanewinckel. This is testimony by V. H. Hildyard's nurse and assistant concerning Dr. Hildyard's impairment and how it affected his surgical procedures.

4. Leston B. Nay, M.D., Dr. Hildyard's attending physician's report concerning V. H. Hildyard's injuries and how it affected his surgical procedures.

5. Dr. Marlin Weaver's medical report concerning petitioner.

6. A Prudential insurance claim form concerning petitioner's surgery on June 3rd, 1970.

7. Interrogatories sent to V. H. Hildyard. This concerns Dr. Hildyard's claim for medical services rendered to Miss Eliopulos during the operation on June 3rd, 1970. He refers to "SHATTERED FOOTPLATE REMOVED". He later denied he perfo med the above.

8. A letter of apology V. H. Hildyard mailed to Miss Eliopulos dated in December of 1972 concerning her surgery on June 3rd, 1970 and his disability.

9. Certificate of Mailing.

IN THE

Supreme Court of the United States

April Term, 1976

No. 75-1406

JOAN ELIOPULOS
Petitioner

v.

V. H. HILDYARD, M.D., AND
MEDICAL ADMINISTRATIONS, INC., ASSIGNEE
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRADFORD PRINTING, DENVER

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Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, V. H. Hildyard, M.D., and Medical Administrations, Inc., Assignee, urge that petitioner's writ of certiorari be denied. This brief is offered in support of respondents' position.

Respondents will rely on the opinions below, the allegations of jurisdiction, and the questions presented for review as presented by petitioner. We shall attempt to clarify her statement of the case and will then state our argument and conclusion.

STATEMENT OF THE CASE

Petitioner has confused and intertwined two separate cases in her petition for certiorari. Respondents will therefore attempt to clarify the history of this case, and to separate it out from the case which is not at bar.

On January 12, 1972, a suit was filed in the County Court in and for the City and County of Denver, Colorado, by

Medical Administrations, Inc., as assignee of Dr. V. H. Hildyard, for $475.00 (plus interest and costs), the amount claimed for the reasonable value of professional services rendered by Dr. Hildyard to the defendant, Joan Eliopulos. Ms. Eliopulos filed a complaint, answer and counter-claim in excess of the County Court's jurisdiction, and requested and was granted a transfer of the case to the District Court in and for the City and County of Denver. The case, when transferred to the District Court, was styled *Joan Eliopulos v. Medical Administrations, Inc., Assignee, and V. H. Hildyard, M.D.*, Civil Action No. C-27482. Plaintiff's counter-claim essentially alleged willful, careless, reckless and negligent diagnosis and performance of the operation. Originally, she requested relief in the amount of $62,500 for anticipated further medical expenses, pain and suffering, and mental suffering. She later amended her complaint, citing an award received by Dr. Hildyard in an entirely separate personal injury action wherein he was the plaintiff (this is the case identified in petitioner's brief as Civil Action No. C-11660). She added to her complaint "willful and wanton disregard for plaintiff's rights and feelings" and increased the amount of damages sought to $300,000, for pain and suffering, temporary and permanent disability, loss of full enjoyment of life, and exemplary damages. Defendants moved to strike the reference to the damages awarded Dr. Hildyard in the other case, which motion was granted February 26, 1973. Petitioner has not appealed the granting of that motion, yet she brings up the doctor's personal injury action again in this petition.

Petitioner had a number of attorneys enter and withdraw on her behalf throughout the course of this case, resulting in her complaint being amended twice. The final amended complaint, on which trial was had, alleged five causes of action, here briefly summarized: (1) performance of the surgery with knowledge of a physical disability affecting such performance, (2) improper diagnosis, (3) negligent performance of the surgery, (4) negligence in not obtaining plaintiff's informed consent, and (5) breach of warranty. Trial to a jury was begun, and at the close of plaintiff's case the trial court granted defendant's motion for directed verdict on all counts. Additionally, Medical Administrations' claim for services rendered was dismissed with prejudice. (Judgment entered February 20, 1975.) Plaintiff appealed to the Colorado Court of Appeals, which affirmed the findings of the trial court on the first four counts, but reversed and remanded for a new trial on the breach of express warranty claim (Pet.'s brief, appendix B, pp. 2a-5a). The petitioner sought and was denied rehearing, and then petitioned the Colorado Supreme Court for a writ of certiorari, which was denied on February 17, 1976, (Pet.'s brief, appendix B, p. 6a). She then presented the instant petition for certiorari to this Court.

ARGUMENT

Respondents assert that this Honorable Court should refuse to hear this case for two reasons: (1) it is not a "final action" within the meaning of 28 U.S.C. 1257, and (2) there is no federal question presented within the meaning of 28 U.S.C. 1257(3).

28 U.S.C. 1257, upon which petitioner relies for jurisdiction, reads as follows:

> Final judgments or decrees by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * *
>
> (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

I. *This is not a final judgment.*

The first reason for denial of the petition is that the judgment is not final within the meaning of 28 U.S.C. 1257, as interpreted by this Court. In *Arnold v. U.S. for use of W. B. Guimarion and Company,* 263 U.S. 427, 44 S.Ct. 144, 68 L.Ed. 371, (1923), this Court said:

> It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. [Citing cases.] (263 U.S. 434)

Petitioner in this case seeks to bring her case in fragments; she seeks certiorari here while she still has a cause of action which may be tried in the trial court, namely the breach of express warranty claim which the Colorado Court of Appeals remanded for a new trial. If certiorari be granted now, she would still be able to get a trial in the Colorado District Court on the breach of express warranty issue, and, upon losing and appealing that cause of action, might end up petitioning this Court again on one of the issues in the same case. This is contrary to the intention of the "final judgment rule."

A great many cases have held that in cases where a state court has remanded part of a case, there is no finality for purposes of Supreme Court review. See for example *Reddall v. Bryan,* 24 How. 420, 65 U.S. 420, 16 L.Ed. 740 (1861), where a state circuit court refused an injunction, and the state court of appeals affirmed the lower court and remanded the case, and the plaintiff appealed to this Court. This Court dismissed the case for want of jurisdiction, the judgment of the highest state court being deemed not final. See also

Houston v. Moore, 3 Wheat. 433, 16 U.S. 433, 4 L.Ed. 428 (1919), where Chief Justice Marshall dismissed the case for lack of finality where the Pennsylvania Supreme Court reversed the trial court and remanded with directions to award a *venire facias de novo,* and *Moore v. Robbins,* 18 Wall. 588, 85 U.S. 588, 21 L.Ed. 758 (1873), where the state appellate court had remanded to the lower court for further proceedings and the Supreme Court dismissed for lack of finality.

County of St. Clair v. Lovington, 18 Wall. 628, 85 U.S. 628, 21 L.Ed. 813 (1873), contains a succinct statement of what is "final" for purposes of Supreme Court review of a state judgment:

> "No judgment is final which does not terminate the litigation between the parties." (18 Wall. 628)

It is abundantly clear that the judgment standing in Colorado now does not terminate the litigation between the parties, as petitioner still has an outstanding cause of action which was remanded to the trial court, and which she has yet to pursue there.

II. *No federal question is presented.*

The second reason that this petition should be denied is that there is no federal question presented, nor indeed was one ever involved at any point in the case. 288 U.S.C. 1257, cited above, requires involvement of a federal question before this Court will hear a writ of certiorari from the highest court of a state with jurisdiction. Moreover, Supreme Court Rule 19, on considerations governing review on certiorari, asserts that review on certiorari will be granted only where special or important reasons exist; such a reason, as to a state court decision, would be, "Where a state court has decided a *federal question of substance* not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." (Emphasis added).

There is no provision for a writ of certiorari from a state court where no federal question is involved.

Medical Administrations' original complaint in County Court was a simple bill collection matter, and Ms. Eliopulos' counter-claim against Medical Administrations and Dr. Hildyard was a malpractice action involving claims of negligence, willful and wanton recklessness, and breach of warranty. All of these claims are matters entirely and exclusively within state jurisdiction. No federal statute was involved, no Constitutional issue, no United States treaty; in short, no matter of federal concern at all was ever in this case. That the Supreme Court denies certiorari where no federal question is involved is well established. *Durley v. Mayo,* 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178, rehearing denied 352 U.S. 859, 77 S.Ct. 22, 1 L. Ed.2d 69 (1956), quoted with approval *Williams v. Kaiser,* 232 U.S. 471, 477, 478; 65 S.Ct. 363, 89 L.Ed. 398 (1945), when it set forth the following:

> It is a well established principle of this Court that before we will review a decision of a state court it must appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. [Citing cases.] (232 U.S. at 481)

The *Reddall* case, cited earlier, was an action in trespass against defendants who asserted that their authority to act upon plaintiff's land was derived from the Executive of the United States (as well as from the state legislature). The United States Supreme Court dismissed for want of jurisdiction because of lack of finality (discussed above) and also because there was *no right claimed under the laws of the United States,* but rather the claim was against rights asserted *by the United States and its agents.* Thus, there was no federal question.

The *Durley* case contains numerous additional citations to cases establishing the "federal question" principle, but it is deemed to be such a well established principle that further citations here would be superfulous.

A look at the "Questions Presented" portion of petitioner's brief makes it clear that there is no federal question involved in the case. The first question raises an issue of fact, whether Dr. Hildyard's operative abilities were impaired, which was determined against petitioner in the Colorado courts. As the Colorado Court of Appeals said in its opinion:

> As to the claim that doctor's own physical impairment resulted in negligent performance of surgery due to lack of skill, the patient produced no evidence showing either negligence in the performance of the surgery or any impairment in the doctor's ability to perform, or in his performance of, this particular surgery. Further, there was no evidence to establish any causal connection between the surgery and the patient's condition thereafter. In fact, there was evidence indicating that her hearing actually improved following the operation. Her later regression was not shown to be in any way related to what the doctor had done. (Pet.'s brief, appendix B, p. 3a)

Questions Number Two and Three are also questions of fact as to the defendant doctor's alleged negligence in failure to inform his patient of the alleged impairment, which were also determined against petitioner in the trial court. The Court of Appeals said:

> The final negligence claim was premised on the allegations that the doctor was negligent in failing to advise the patient of the serious nature and circumstances, the risks, and the possible complications inherent in the proposed surgery, and in fail-

> ing to advise her of his own physical impairment, and that, as a proximate result of this negligence, the patient was damaged. There being no proof that her post-operative condition was caused by the surgery, that claim also was properly rejected. *Lamme v. Ortega,* 129 Colo. 149, 267 P.2d 1115; *Brown v. Hughes,* 94 Colo. 295, 30 P.2d 259.
>
> The patient having failed to prove the elements of negligence, a directed verdict was proper as to those claims. That there may have been a bad result is not of itself proof of negligence on the part of the doctor. *Brown v. Hughes, supra.* (Pet.'s brief, appendix B, pp. 3a, 4a)

Question Number Four asks, "Whether it is a patient's inherent right to be informed of the attending physician's disability before any surgery is attempted upon patient's body." (Pet.'s brief, p. 2.) This is the only one of the questions presented which can be characterized as a question of law, but it assumes the establishment of a fact which was determined not to be true in the trial court; it was determined that the physician did not have a disability which was related to his performance of petitioner's operation. This fact determination was affirmed in the Court of Appeals. The existence or not of a disability is properly decided in the trial court and may be looked into by the appellate court only where it appears that the trial court acted in bad faith or contrary to or unsupported by the evidence. As shown above, the Colorado Court of Appeals expressly affirmed the trial court's findings on the negligence issues.

Even assuming that a disability existed, the patient's right to be informed of it does not involve a federal question. No federal statue nor the Constitution grants such a right. The safety and welfare of its citizens have traditionally been deemed to be matters entrusted to the states, and properly so.

Justice Douglas, in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed. 379 (1973), stated that two of the policies served by the finality requirement are avoiding piecemeal review and minimizing federal intrusion into state affairs. This second policy is equally well-served by the federal question rule. Respondents assert that those two policies should govern the denial of certiorari in this case.

CONCLUSION

Respondents ask that this Court deny the petition for certiorari on the grounds that the judgment is not final and that no federal question is involved, and award such relief as to this Court seems just and proper.

Respectfully submitted,

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Attorney for Respondents
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Denver, Colorado 80202

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1406

JOAN ELIOPULOS
Petitioner

V.

V. H. HILDYARD, M. D., AND
MEDICAL ADMINISTRATIONS INC., *Assignee*

PETITIONER'S REPLY BRIEF IN OPPOSITION TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1406

JOAN ELIOPULOS,
Petitioner

V.

V. H. HILDYARD, M. D., AND MEDICAL ADMINISTRATIONS INC., *Assignee*

Comes now Petitioner, Joan Eliopulos, in reply to Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

Respondent's argument states the safety and welfare of its citizens have traditionally been deemed to be matters entrusted to the states, and properly so. (Res.'s Brief p. 8.)

Petitioner respectfully contends direct evidence was had in the Colorado courts of law to prove without aid from inference or reasoning that V. H. Hildyard, M.D., suffered from a physical disability of such magnitude so as to render

him unable to perform surgical services with reasonable skill and safety to his patients – yet – by quashing the claims of disability, negligence, and informed consent, V. H. Hildyard, M.D. has been given permission thru the State of Colorado to continue his one-armed surgery on his unwary patients with no fear of litigation whatever.

In conclusion – for these reasons – Petitioner prays this high tribunal with its sound judicial power, the power of judging wisely and justly, intervene in this dispute of parties – in the interest of better serving justice – grant Petitioner's Writ of Certiorari – bring forth her files from the lower courts – thus exercising the original jurisdiction this high court has over inferior courts to determine the facts and issues of this case at bar, protecting the public from unprofessional, disabled, incompetent surgeons who threaten the public health, safety and welfare of our society. They must be stopped! The power and decision lies in the hands of this Honorable Court, the highest tribunal of these United States.

Respectfully submitted:

Joan Eliopulos
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APPENDIX A

CERTIFICATE OF MAILING

This is to certify that I, Joan Eliopulos, have mailed four true and complete copies of this Reply Brief in Opposition to Respondent's Brief in Opposition to Petition for a Writ of Certiorari, by placing in the United States Mail with sufficient postage thereon, this _____ day of May, 1976, to:

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